

STATE OF MICHIGAN
COURT OF APPEALS

RONALD BRYANT, JR.,

Plaintiff-Appellant,

v

C & D HUGHES, INC.,

Defendant-Appellee.

UNPUBLISHED

January 19, 2006

No. 256664

Jackson Circuit Court

LC No. 03-003816-NO

Before: Fitzgerald, P.J., and O'Connell and Kelly, JJ.

KELLY, J. (*dissenting*).

I respectfully dissent from my colleagues' opinion. I would affirm the trial court's order granting summary disposition in defendants' favor.

Defendant was hired, as a subcontractor, to perform pipe and drainage work for a highway construction project in Jackson County. It is undisputed that defendant installed the manhole on April 29, 2002, and that defendant owed a duty to cover the manhole before leaving the construction site.¹ Two months after the installation of the manhole, on June 24, 2002, plaintiff was injured when he fell into the manhole while finishing cement at the construction site. At the time of the fall, the manhole was uncovered. According to plaintiff, high grass was growing around the manhole and, therefore, the manhole was just "part of the scenery." The central issue to this appeal is whether there is any evidence to create a genuine issue of material fact as to whether defendant did not cover the manhole on April 29, 2002, before leaving the construction site.

We review a trial court's ruling on a motion for summary disposition de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). As our Supreme Court stated in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996):

¹ A temporary plate is generally placed over the top of an open and exposed manhole. The metal plate used to cover a manhole is commonly referred to as a "road plate." A road plate is a square metal plate approximately three-feet by three-feet weighing sixty to eighty pounds.

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [Citations omitted.]

There were two hearings on defendant's motion for summary disposition. At the first hearing, defendant submitted an affidavit from Charlie Kunkel, defendant's superintendent and project manager on this construction project. In his affidavit, he attested that he was competent to "testify with personal knowledge as to the facts" contained in his affidavit and that defendant placed a "75-pound road plate" over the open manhole on April 29, 2002. In addition, defendant's attorney submitted an affidavit requesting additional time, pursuant to MCR 2.116(H), to secure the affidavit of Scott Jones. Defendant's attorney attested that Jones was hired by the state to inspect the work performed by defendant at the highway construction site, that Jones prepared an inspection report for the manhole, and that Jones would testify that he would not have prepared the report unless the manhole was covered.

In response, plaintiff asserted that the manhole "does speak for itself" because it was not covered on the day of the accident. The trial court found that *res ipsa loquitur* did not apply because defendant did not have exclusive control of the premises.² The trial court then stated:

[T]he critical question is: at the time [defendant] did the work on April of '02, was there a plate covering the top of it which was in accordance with the usual customary practice.

As of now, we do have Mr. Konkel [sic] testifying to that. And, if you do submit an affidavit of Mr. Jones to that effect, then a summary disposition will enter on behalf of [defendant], but I want to see that affidavit first.

Accordingly, the trial court adjourned the hearing to permit the parties to obtain an affidavit or deposition testimony from Jones.

At his deposition, Jones testified that he inspected the work performed by defendant at the highway construction site. As part of the inspection process, Jones was required to complete inspector's daily reports ("IDR"). According to Jones, the IDR indicated that defendant installed the manhole on April 29, 2002. Jones stated that under his standard procedure, he did not fill out an IDR unless all of the work was completed, part of which would include covering the manhole. Specifically, Jones testified that he would not have completed the IDR if the manhole was not covered. Thus, Jones testified that, based on this standard procedure, the manhole was covered

² Plaintiff does not dispute the applicability of this theory on appeal.

on April 29, 2002. Under cross-examination, Jones further testified that he could not independently recall the manhole or whether it was covered, nor could he recall if he followed his standard procedures that day when filling out the IDR.

At the second hearing on the motion for summary disposition, the court granted defendant's motion stating:

There's some obligation on part of the Plaintiff to go forward to show that the Defendant did something wrong. We have nothing here but guess and speculation that, because it was uncovered, that means the Defendant did something wrong, in effect a *res ipsa* theory, when *res ipsa* does not apply in this case.

[I]n my mind, there's just nothing to go to the jury. There's just no genuine material issue of fact with regards to Defendant having done something wrong.

In fact, all of the proofs are to the contrary, and so, therefore, with lack of proofs on the part of the Plaintiff to show that the Defendant did anything wrong, the Motion for Summary Disposition is granted.

In my opinion, the trial court did not err in granting summary disposition on this record. Plaintiff did not submit anything to the trial court to contradict or refute the evidence presented by defendant. Even on appeal, plaintiff continues to rely on the mere fact that the manhole was not covered on the day of the accident to prove that defendant failed to cover the manhole on the day it left the construction site. But, as noted by the trial court, Kunkel's uncontroverted affidavit states that defendant placed a road plate on top of the manhole after defendant installed the manhole on April 29, 2002. Similarly, Jones' deposition testimony indicates that because he completed an IDR on April 29, 2002, defendant must have covered the manhole on that day even though he had no independent recollection of the circumstances surrounding the completion of the IDR. See MRE 406.

Plaintiff also relies on the fact that tall grass had grown around the manhole and argues that the grass would not have grown there if a road plate had been placed over the manhole. Plaintiff argues that the absence of a "square patch" of dirt surrounding the manhole is circumstantial evidence that a road plate was not present. However, there is no testimony that there was either an absence of a "square patch" of dirt or that the grass was even growing to the edge of the manhole. In fact, the record is devoid of any evidence in this regard with the exception of plaintiff's testimony that the grass obscured the manhole and was "part of the scenery." There were no pictures of the manhole nor was any indication that anyone inspected the manhole after the accident. The presence of grass around the manhole does not indicate one way or the other that defendant failed to cover the manhole.

I agree with the trial court that plaintiff's assertion that defendant never covered the manhole is mere speculation unsupported by any evidence. Because plaintiff failed to present any evidence establishing the existence of a material factual dispute in response to defendant's motion, the trial court properly entered the order granting summary disposition. I would affirm.

/s/ Kirsten Frank Kelly